

whether Federal hazardous materials transportation law preempts certain New Mexico requirements concerning the transportation of liquefied petroleum gas and compressed natural gas within New Mexico.

**DATES:** Comments received on or before May 15, 2000, and rebuttal comments received on or before June 29, 2000 will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

**ADDRESSES:** The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590-0001. The application and all comments are also available on-line through the home page of DOT's Docket Management System at "http://dms.dot.gov."

Comments must refer to Docket No. RSPA-00-7092 and may be submitted to the Dockets Office either in writing or electronically. Send three copies of each written comment to the Dockets Office at the above address. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. To submit comments electronically, log onto the Docket Management System website at "http://dms.dot.gov" and click on "Help & Information" to obtain instructions.

A copy of each comment must also be sent to: (1) Mr. Paul M. Bomgardner, Director, Hazardous Materials Policy, American Trucking Associations, Inc., 2200 Mill Road, Alexandria, Virginia 22314-4677; and (2) Mr. Michael Chapman, Chairman, Construction Industries Commission, P.O. Box 25101, Santa Fe, New Mexico 87504. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: "I certify that copies of this comment have been sent to Mr. Bomgardner and Mr. Chapman at the addresses specified in the **Federal Register**.")

A list and subject matter index of hazardous materials preemption cases, including all inconsistency rulings and preemption determinations issued, are available through the home page of RSPA's Office of the Chief Counsel at "http://rspa-atty.dot.gov." You may ask for a paper copy of this list and index by contacting Nancy Machado by mail or by telephone as provided below under the heading **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Nancy Machado, Office of the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, SW, Washington DC 20590-0001 (Tel. No. 202-366-4400).

**SUPPLEMENTARY INFORMATION:**

**I. Application for a Preemption Determination**

The American Trucking Associations, Inc. (ATA) has applied for a determination that Federal hazardous material transportation law (federal hazmat law), 49 U.S.C. 5101 et seq., preempts certain requirements contained in the State of New Mexico's 1978 "LPG and CNG Act," 5 New Mexico Statutes Annotated (NMSA) chapter 70, article 5, and in the corresponding regulations in the New Mexico Construction Industries Division Liquefied Petroleum Gas Standards, 19 New Mexico Annotated Code (NMAC), chapter 15, part 4. ATA asserts that the New Mexico requirements at issue apply to interstate carriers transporting liquefied petroleum gases and liquefied natural gases within New Mexico.

The test of ATA's application, a list of the exhibits to the application, and ATA's March 15, 2000 Addendum to Application are set forth in Appendix A to this notice. A paper copy of the exhibits to ATA's application (which have been placed in the public docket) will be provided at no cost upon request to Nancy Machado, at the address and telephone number set forth above under the heading "For Further Information Contact."

In the application for preemption, ATA challenges:

(1) NMSA section 70-5-7 ("Requiring competent employees in transporting, dispensing, installation, service or repair") and the corresponding regulations at 19 NMAC 15.4.9.1 through 15.4.9.5 ("Examination"), 19 NMAC 15.4.15.13 ("Licensing examination fee"), and 19 NMAC 15.4.15.14 ("License re-examination fee").

NMSA section 70-5-7 states,

The [New Mexico Liquefied Petroleum and Compressed Gas] Bureau may require each person, firm, or corporation that transports or dispenses LP gas \*\*\* to have all persons who perform these activities pass an appropriate examination based on the safety requirements of the [Construction Industries] commission.

19 NMAC 15.4.9.1 states,

All personnel whose duties require that they transport or dispense LP Gas shall prove by passing an examination, as required by the [New Mexico Liquefied Petroleum and Compressed Gas] Bureau that they are familiar with minimum safety standards and

**DEPARTMENT OF TRANSPORTATION**

**Research and Special Programs Administration**

[Docket No. RSPA-00-7092 (PDA-22(R))]-L/

**Application by American Trucking Associations, Inc. for a Preemption Determination as to New Mexico Requirements for the Transportation of Liquefied and Compressed Gases**

**AGENCY:** Research and Special Programs Administration (RSPA).

**ACTION:** Public Notice and Invitation to Comment.

**SUMMARY:** Interested parties are invited to submit comments on an application by the American Trucking Associations, Inc. for an administrative determination

practices with regard to handling of LP Gas. LP Gas may not be dispensed by any person who has not passed the examination by the Bureau.

19 NMAC 15.4.9.2 and 15.4.9.5 relate to identification cards for those who successfully pass the examination, to identification card annual renewal, and to re-examination requirements, 19 NMAC 15.4.15.13 and 19 NMAC 15.4.15.14 impose a \$25 fee for license examinations and a \$25 fee for license re-examinations.

ATA asserts that the New Mexico Liquefied Petroleum and Compressed Gas Bureau ("Bureau") requires any person who operates, loads, or unloads an LP gas transport vehicle, including drivers in interstate commerce who are domiciled outside of the state, to take a safety examination at a facility located in New Mexico before being allowed to perform LP gas related functions within the state. ATA contends that compliance with the New Mexico examination requirements imposes costs and administrative burdens on transporters, creates confusion, reduces compliance, and decreases safety. Furthermore, ATA argues that the New Mexico examination requirements are in addition to the HMR training and testing requirements at 49 CFR part 172 Subpart H and 49 CFR 177.816, present an obstacle to the objectives of the HMR, and are preempted under federal hazmat law.

(2) NMSA section 70-5-9(A) ("Annual license fees; inspection fees"), NMSA 70-5-10 ("Revenue; suspense fund"), and the corresponding regulations at 19 NMAC 15.4.15.1 ("Wholesale sale or delivery of LP Gas") and 19 NMAC 15.4.15.12 ("Annual renewal fee per qualifying party identification card").

Specifically, ATA states that, under 19 NMAC 15.4.15.1, interstate carriers must pay an annual flat license fee of \$125 to conduct the wholesale sale or delivery of LP gas in New Mexico. NMSA section 70-5-9(A) indicates that the fees are intended to defray the state's costs to administer the laws relating to the LP gas industry. In addition, when the motor carrier pays its annual \$125 license fee, 19 NMAC 15.4.15.12 requires that it also pay a \$10 annual identification card renewal fee for each of its drivers who has successfully completed the state's safety examination. Finally, ATA notes that NMSA section 70-5-10 requires the state to deposit the fees collected under the provisions of the LPG and CNG Act into the state general fund.

ATA argues in its application that New Mexico's \$125 annual license fee and \$10 annual identification card

renewal fee are flat fees that discriminate against interstate carriers. Specifically, ATA argues that the fees place a disproportionate share of the costs of administering New Mexico's LP Gas program on interstate carriers how have less of presence in the state than intrastate carriers. Consequently, ATA argues that the fees are unfair, violate the commerce clause, and are preempted under Federal hazmat law. Additionally, ATA argues that the fees are preempted because they are deposited in the state general fund and are not earmarked for hazardous materials transportation purposes.

(3) NMSA Section 70-5-9(C) ("Annual license fees; inspection fees") and the corresponding regulations at 19 NMAC 15.4.10.1 ("Annual inspections") and 19 NMAC 15.4.14.3(C) ("LP Gas Visual Cargo Tank and Equipment Inspection Form" and "Re-inspection of Cargo Tank and Equipment and additional charge for re-inspection").

NMSA section 70-5-9(C) requires a reasonable inspection fee to be paid to the Bureau for the safety inspection of the LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities. 19 NMAC 15.4.10.1 requires that the Bureau conduct annual inspections of the safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities. 19 NMAC 15.4.14.3(C) assesses a \$37.50 fee for the safety inspection and a \$37.50 fee for re-inspection.

ATA asserts that there is no written process that outlines the means of obtaining this safety inspection from the Bureau. ATA contends that, in practice, an interstate carrier has to present each of its LP gas trailers to inspectors in New Mexico at a preset date and location, regardless of the fact that the carrier's principal place of business may be in another state. Furthermore, ATA argues that under New Mexico's regulations, an interstate carrier must either take a vehicle out of service or vary its route when loaded in order to accommodate the inspection, thus causing unnecessary delays in the transportation of hazardous materials. ATA's application contains the affidavit of an interstate carrier executive who states that twice his company has tried out been unable to schedule a vehicle inspection in time to make a delivery into or through New Mexico. Also, ATA submits that motor carriers are already subject to Federal annual and random roadside inspections. Consequently, ATA argues that New Mexico's annual inspection is redundant, causes unnecessary delays, and is preempted under Federal hazmat law.

## II. Federal Preemption

Section 5125 of Title 49 U.S.C. contains the preemption provisions that are relevant to ATA's application. Subsection (a) provides that in the absence of a waiver of preemption by DOT under § 5125(e) or specific authority in another Federal law-a requirement of a State, political subdivision of a State, or Indian tribe if preempted if:

(1) Complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or

(2) The requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to the accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

These two paragraphs set forth the "dual compliance" and "obstacle" criteria which RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Pub. L. 93-633 § 112(a), 88 Stat. 2161 (1975). The dual compliance and obstacle criteria are based on US Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects, that is not "substantively the same as" a provision of federal hazmat law or a regulation prescribed under that law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(A) The designation, description, and classification of hazardous material.

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) The design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

To be "substantively the same," the non-Federal requirement must "conform[] in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted." 49 CFR 107.202(d).

Subsection (g)(l) of 49 U.S.C. 5125 provides that a State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. RSPA has found that a fee is fair if it is: (a) based on a fair approximation of use of state facilities; (b) not excessive in relation to benefits conferred; and (c) does not discriminate against interstate commerce. Preemption Determination (PD)-21(R), 64 FR 54474, 54478 (Oct 6, 1999), citing *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 717, 92 S. Ct. 1349, 1355 (1972) and *Northwest Airlines, Inc. v. Kent*, 510 U.S. 355, 367-68, 114 S. Ct. 855, 864 (1994). If a fee is not fair or is not used for hazardous materials transportation purposes, the fee is preempted under federal hazmat law. See PD-21(R) at 54478 and PD-9(R), 60 FR 8773, 8782 (Feb. 15, 1995).

The preemption provisions in 49 U.S.C. 5125 carry out Congress's view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In considering the HMTA, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation."

S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). When it amended the HMTA in 1990, Congress specifically found that:

(3) Many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) Because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) In order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. 101-615 § 2, 104 Stat. 3244. A Federal Court of Appeals has found that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments that expanded the original preemption provisions. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). (In 1994, Congress revised, codified and enacted the HMTA "without substantive change," at 49 U.S.C. Chapter 51. Pub. L. 103-272, 108 Stat. 745.)

### III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated authority to make determinations of preemption that concern highway routing to FMCSA and those concerning all other hazardous materials transportation issues to RSPA. 49 CFR 1.53(b) and 1.73(d)(2) (as added October 9, 1999, 64 FR 56720, 56721 [Oct. 19, 1999], and revised January 1, 2000, 65 FR 220,221 [Jan. 4, 2000]). Because ATA's application concerns non-highway routing issues, RSPA's Associate Administrator for Hazardous Materials Safety will address the issues raised in ATA's application.

Section 5125(d)(1) requires that notice of an application for a preemption determination be published in the **Federal Register**. Following the receipt and consideration of written comments, RSPA will publish its determination in the **Federal Register**. See 49 CFR 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution or under statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, address, "fairness" of fees, or interpret relevant statutory language. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policies set

forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (August 4, 1999)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

### IV. Public Comments

All comments should be limited to the issue of whether 49 U.S.C. 5125 preempts the New Mexico requirements applicable to the transportation of liquefied petroleum gas and compressed natural gas. Comments should specifically address the preemption criteria detailed in Part II, above, and set forth in detail the manner in which the New Mexico requirements are applied and enforced.

Persons intending to comment should review the standards and procedures governing consideration of applications for preemption determinations set forth at 49 CFR 107.201-107.211.

Issued in Washington, DC on March 27, 2000.

**Robert A. McGuire,**

*Acting Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.*

### Appendix A

American Trucking Associations  
Alexandria, VA  
January 18, 2000.

Mr. Robert McGuire

Acting Associate Administrator for  
Hazardous Materials Safety, Research and  
Special Programs Administration, U.S.  
Department of Transportation, 400 7th  
Street, SW, Washington, DC 20590-0001.  
Attention: Hazardous Materials Preemption  
Docket

Re: Application for Preemption

Determination in accordance with 49 CFR Part 107, Subpart C. Section 107.203, regarding provisions of New Mexico "LPG and CNG Act" (N.M. Stat. Ann. §§ 70-5-1 to 70-5-23 (1998)) and corresponding regulations of the New Mexico Construction Industries Division, Liquefied Petroleum Gas Bureau (Title 19, Chapter 15, Part 4 [19NMAC15.4]).

Dear Mr. McGuire: The American Trucking Associations, Inc. ("ATA"), with offices located at 2200 Mill Road, Alexandria, VA 22314, is the trade association for the trucking industry.

Together with our affiliated conferences, councils, and state associations, ATA represents over 30,000 motor carriers of all types and sizes throughout the United States. ATA files this application for preemption determination on behalf of our member companies affected by the provisions of the LPG and CNG Act.

ATA is requesting a determination of preemption of certain requirements of the State of New Mexico's 1978 "LPG and CNG Act" as found in Chapter 70 Article 5 of the New Mexico Statute Annotated (NMSA 1978 Chapter 70, Article 5) and in the corresponding regulations of the New Mexico Construction Industries Division's Liquefied Petroleum Gas Standards as found in Title 19 Chapter 15, Part 4 of the New Mexico Annotated Code (19NMAC 15.4). Specifically, ATA requests consideration of the following provisions of the NMSA 1978 and 19NMAC:

1. NMSA 1978 70-5-7 (Liquefied Petroleum Gas Handling License)(19 NMAC 15.4.9.1 through 15.4.9.5);
2. NMSA 1978 70-5-9 (New Mexico Liquefied Petroleum Gas Tank Inspection)(19 NMAC 15.4.10.1); and
3. NMSA 70-50-10 (Revenue; Suspense Fund)(19 NMAC 15.4.14.3C, 15.4.15.1., 15.4.15.13, and 15.4.15.14).

As discussed below, certain of the requirements contained in sections of the New Mexico Statute Annotated (NMSA) and the New Mexico Annotated Code (NMAC) regarding transportation of Liquefied Petroleum Gases (LPG) and/or Liquefied Natural Gases (LNG) are obstacles to the accomplishment of the objectives of the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) and should be preempted according to the provisions of 49 U.S.C. § 5125(a)(2).

#### I. Background

NMSA 1978 70-5-6-(A) General License states that:

"No person, firm or corporation shall engage in this state \* \* \*, nor shall any person, firm or corporation engage in the manufacture, sale, *transportation*, dispensing or storage of LP gases within this state, \* \* \* without having first obtained from the bureau a license to do so for each main and branch office or businesses operated within the state pursuant to the LPG and CNG Act [this article] [emphasis added]."

19 NMAC 15.4.15.1 (LP-1) Wholesale Sale or Delivery of LP Gas states:

"A licensee under this classification is authorized to wholesale, transport, and/or deliver gas \* \* \*"

Consequently, motor carriers transporting LPG and CNG in New Mexico must obtain a license from the State to do so and as licensees are then subject to all of the requirements provided for in 19 NMAC 15.4 (Code). These additional requirements go beyond those contained in 49 CFR Parts 100-180 of the Hazardous Materials Regulations (HMR), create confusion, and impose burdens on transporters to such an extent that they are obstacles to the accomplishment of the Hazardous Materials Transportation Act's (HMTA) [49 U.S.C. 5101, *et seq.*] objectives, and should, therefore be preempted.

#### II. New Mexico Stat. Ann. § 70-5-7 Requiring Competent Employees in Transporting, Dispensing, Installation, Service or Repair and 19 NMAC 15.4.9.1 Examination

New Mexico Stat. Ann. § 70-5-7(A) states:

"The bureau may require each person, firm or corporation that transports or dispenses LP gas or that installs, repairs or services appliances, containers, equipment or piping for the use of LP gas to have all persons who perform these activities pass an appropriate examination based on the safety requirements of the commission."

19 NMAC 15.4.9.1 Examination states:

"All personnel whose duties require that they transport or dispense LG Gas shall prove by passing an examination, as required by the Bureau, that they are familiar with minimum safety standards and practices with regard to handling of LP Gas. LP Gas may not be dispensed by any person who has not passed the examination by the Bureau."

Under the authority of this provision, the New Mexico Liquefied Petroleum and Compressed Gas Bureau ("Bureau") requires any person who operates, loads, or unloads an LP gas transport vehicle, including drivers in interstate commerce, to take an examination before being allowed to perform those functions as they relate to LP gas within the State of New Mexico. These tests are scheduled at various times at different locations throughout the State. All applicants for licensure, whether domiciled inside or outside of New Mexico, must take the test at one of the designated locations within the State. Consequently, compliance with the New Mexico testing requirement imposes cost and administrative burdens on transporters, confusion, reduced compliance, and decreased safety would result if transporters faced a multiplicity of such requirements.

The requirement to test at the state level in order to be able to transport, load, or unload LP gas, which is a Division 2.1 Flammable Gas, and therefore a hazardous material, is in

addition to the training and testing requirements in the Hazardous Materials Regulations ("HMR") at 49 CFR Part 172 Subpart H, § 172.702(a) and (d) and § 172.704(2) through (cl. While 49 CFR § 172.701 allows states to impose more stringent training requirements, they are permitted to do so only if those requirements do not conflict with the requirements of Part 172 Subpart H and Part 177 § 177.816, and "[a]pply only to drivers domiciled in that State". New Mexico's requirement for testing is stricter than the training requirements of the HMR and is applied to drivers that are domiciled outside of New Mexico. It, therefore, represents an obstacle to accomplishing the full purposes and objectives of the HMTA and must be preempted.

The New Mexico requirement for motor vehicle operators loading, unloading or transporting LP gas is similar in nature to the State of Maryland requirement that was preempted by the Research and Special Programs Administration (RSPA) in PD-7(R), 59 FR 28913, 28919 (June 3, 1994) (noting that "operators potentially would be subject to numerous sets of training requirements, with resulting confusion, cost and paperwork burdens," RSPA found that training requirements as applied to "operators not domiciled in Maryland" were an "obstacle to accomplishing the full objectives and purposes of the HMTA and [were] preempted."); see also, PD-13(R), 63 FR 45283 (August 25, 1998) (preempting requirement that motor vehicle drivers obtain certificate of fitness to be eligible to deliver LPG.)

Because the additional "testing" requirement reaches beyond the domiciliaries of the State of New Mexico, NM Stat. Ann. § 70-5-7(A) and 19 NMAC 15.4.9.1 as they apply interstate operators domiciled in other states should be preempted.

#### III. New Mexico Stat. Ann § 70-5-9 Annual License Fees; Inspection Fees and § 70-5-10 Revenue; Suspense Fund and 19 NMAC 15.4.15.1 LP-1 Wholesale Sale or Delivery of LP Gas and 19 NMAC 15.4.15.12 Annual Renewal Fee Per Qualifying Party Identification Card

New Mexico Stat. Ann. § 70-5-9 (A) states:

"For the purpose of defraying the expenses of administering the laws relating to the use of CNG motor vehicles or the LP gas industry, each person, firm or corporation, at the time of application for a license and annually thereafter on or before December 31 of each calendar year, shall pay the bureau

reasonable license fees as set, classified and defined by the bureau for each operating location."

Additionally, NM Stat. Ann § 70-5-10 states, regarding fees:

"All fees and money collected under the provisions of the LPG and CNG Act [this article] shall be remitted by the bureau to the director of the division to be deposited in the general fund of the state. The bureau may maintain a "special suspense fund" with the division in an amount of one thousand dollars (\$1,000) budgeted by the bureau for the purpose of making any necessary refunds. The bureau shall, with the advice of consent of the director of the division, employ inspectors, assistants and other necessary help as may be required to carry out its lawful duties."

19 NMAC 15.4 License Classifications, Scopes, and Fees states:

"License classifications are defined and annual license fees are set as follows:

15.1 LP-1 Wholesale sale or delivery of LP Gas: \$125.00 A licensee under this classification is authorized to wholesale, transport, and/or deliver gas in vehicular units into or out of any location except that of an ultimate consumer.

15.12 Annual renewal fee per qualifying part) identification card: \$10.00."

Motor carriers who deliver LP gas in New Mexico are in category LP-1 and must pay an annual flat fee of \$125.00, plus \$10.00 for each "Qualifying Party Card." These fees are then placed into the State's general fund and are not earmarked for purposes related to the transportation of hazardous material.

The HMTA provides that a "State \* \* \* may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material \* \* \*" [49 U.S.C. 5125(g)(1)]. The New Mexico fees fail both requirements.

First, because the fees are annual, flat charges that are unapportioned to the level of a motor carrier's presence or activities in the State, they are structurally discriminatory and violate the Commerce Clause. A state fee that violates the Commerce Clause cannot be considered to be "fair." See, PD-21(R), 64 FR 54474 (October 6, 1999) ("Because Tennessee's remedial action fee imposed on hazardous waste transporters is not based on some fair approximation of the use of the facilities and discriminates against interstate commerce, it is not fair and violates 49 U.S.C. 5125(g)(1) and is preempted \* \* \*").

Flat annual fees, like New Mexico's, discriminate against and impose an undue burden on interstate motor carriers and thus

violate the Commerce Clause. The privilege of conducting LPG and CNG transportation in New Mexico is inherently more valuable to intrastate carriers and conduct all of their operations in the State than it is to those carriers that operate predominantly in interstate commerce. Therefore, the practical effect of collecting regulatory costs on a per-company basis is to place a disproportionate share of those cost on interstate motor carriers. "[I]mposition of [a] flat tax [] for a privilege that is several times more valuable to a local business than it is to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause."

*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 296 (1987). Moreover, flat charges, like the New Mexico fees, inevitably expose interstate trucks to duplicative taxation. "[T]he interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax." *Scheiner*, at 282 (citation omitted).

Flat fees imposed on hazardous materials and hazardous waste haulers have been routinely struck down as violative of the Commerce Clause. See, *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) (\$25 per-truck hazardous material transporter annual charge struck down); *American Trucking Associations, Inc. v. Secretary of Administration*, 613 NE 2d 95 (Mass. 1993) (\$200 per-truck annual hazardous waste transporter fee held unconstitutional); *American Trucking Associations, Inc. v. Wisconsin*, 556 N.W.2d 761 (Wis. App. Ct. 1996) (\$400 per-company, per-activity hazardous material transporter annual fee found to violate the Commerce Clause).

The New Mexico \$125 per-company annual LPG/CNG delivery fee (and associated \$10 Qualifying Party Card fee) are unquestionably flat, unapportioned charges that discriminate and burden interstate commerce as discussed above. Accordingly, such charges cannot be considered "fair" as contemplated by Section 5125 (g)(1) and must be preempted.

Second, the fees are placed into the State of New Mexico's general fund and are not earmarked for hazardous materials transportation purposes. Although NM Stat. Ann. section 70-5-10 states generally that the Bureau may employ staff to carry out its lawful duties, there is no tracking of fees paid by motor carriers and no assurance that the moneys paid by motor carriers will actually be used for purposes related to hazardous

materials transportation, including enforcement and planning, development and maintenance of emergency response capability.

Because the fees collected from transporters as required by 19 NMAC 15.4.15.1 and .15.12 and deposited in the general fund of the State per NM Stat. Ann. section 70-5-10 are not specifically earmarked for those purposes set forth in 49 U.S.C. 5125(g), they should be preempted.

IV. New Mexico Stat. Ann. section 70-5-9 (C) Annual License Fees; Inspection Fees

New Mexico Stat. Ann. section 70-5-9 (C) states:

"In addition, there shall be paid a reasonable fee for the safety inspection, made by a representative of the bureau, of each LP gas bulk storage plant, LP gas liquid transfer facility and of the LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities."

19 NMAC 15.4.10.1 Annual Inspections states:

"There shall be an annual safety inspection, made by an inspector of the Bureau, of each bulk storage plant facility, dispensing station, vehicle fuel dispenser, and cargo container and safety equipment on each vehicular unit used for transportation of LP gas in bulk quantities. Each bulk plant, dispenser, and vehicular unit shall display a current decal showing it has passed the required inspection."

19 NMAC 15.4.14 Printed Forms, Permits, and Fees requires in:

.3.C LP Gas Visual Cargo Tank and Equipment Inspection Form, an accompanying fee of \$37.50; and for Re-inspection of Cargo Tank Equipment and additional charge for re-inspection a fee of \$37.50.

While the statute and Code make reference to "safety inspections" of "LP gas equipment on each vehicular unit used for transportation of LP gas in bulk quantities," there is no mention as to the process by which the inspection should be completed. According to one company, though, each LP gas trailer must be presented to inspectors in New Mexico at a preset date and location, regardless of the location of the motor carrier's principal place of business. A fee of \$37.50 must be prepaid for each such inspection. See Affidavit of Lloyd Dean, Vice President of Operations, Basin Western, Inc.

ATA is aware that RSPA has, in the past, approved inspections and related fees relative to permits. See PD-13(R), 63 FR 45283, 45286 (approving

inspection and fee where fee covered the cost of conducting the inspection and actually issuing the permit). However, the proliferation of inspection requirements (e.g., in New Orleans, LA; Houston, TX; Nassau County, NY; Broward County, FL; and Cleveland, OH) is alarming and is causing disruptions in motor carrier operations. Because there is a need to either take the vehicle out of service, or vary the route when loaded, in order to accommodate the inspection, there are unnecessary delays in the transportation of hazardous materials.

We believe that RSPA has erred in not considering the impact on the interstate transportation of hazardous materials of multiple jurisdictions requiring fee supported annual inspections. Under the U.S. Supreme Court's "internal consistency" test, a law's impact on interstate commerce is examined in the context of its impact if every other jurisdiction imposed an identical requirement. *Oklahoma Tax Comm'n v. Jefferson Lines*, 115 S. Ct. 1331, 1338 (1997). There can be little dispute that interstate hazardous materials transporting commerce would come to a halt if every jurisdiction in which a truck operated (perhaps thousands of cities, counties, and states) required that the truck undergo a separate, duplicative fee-supported inspection. If RSPA is concerned about the theoretical nature of the internal consistency analysis, it need look no further than the inspection requirements cited above to assure itself that the burden of cumulative inspections and fees is already occurring.

The multiple inspections and fees a hazardous materials transporting vehicle now faces cannot help but result in unreasonable transportation delays and thus are contrary to the HMR's mandate that shipments of hazardous materials be transported without unnecessary delay (see 49 CFR 177.800(d)).

Motor carriers are already subject to Federal annual and random roadside vehicle inspections according to 49 CFR Part 396 and to inspection, repair and maintenance requirements for cargo tanks in 49 CFR 180.401 through 180.417. Therefore, New Mexico's requirement for safety inspections is redundant, causes unnecessary delay in the transportation of hazardous materials, and should be preempted as an obstacle to the accomplishment of the full purposes and objectives of the HMTA.

#### V. Conclusion

Based on the information provided in this application, ATA urges RSPA to preempt certain aspects of the State of New Mexico's requirements found in NM Stat. Ann.

Chapter 70 Oil and Gas, Article 5 Liquefied and Compressed Gases and in 19 NMAC 15.4 as they relate to:

- (1) Examinations for drivers of interstate motor carriers;
- (2) Fees for motor carriers regarding permits and inspections; and
- (3) Safety inspections of vehicles used to transport LP gas.

Thank you for the opportunity to submit this application. If you have any questions regarding information supplied in this application, please contact the undersigned at: 703-838-1849 (Phone); 703-683-1934 (FAX); or by e-mail at: pbomgard@trucking.org.

VI. Certification of Notice as Required in 49 CFR Part 107 Section 107.205(a).

I certify that a copy of this application has been sent this 18<sup>th</sup> day of January, 2000 to: Mr. Michael Chapman, Chairman, Construction Industries Commission, at P.O. Box 25101, Santa Fe, New Mexico 87504.

Signature

Date:

Respectfully submitted:

Paul M. Bomgardner,  
Director, Hazardous Materials Policy,  
American Trucking Associations, Inc.

Attachments:

Affidavit of: Mr. Lloyd Dean, VP Operations,  
Basin Western, Inc.

State of New Mexico Construction Industries  
Division Liquefied Petroleum Gas  
Standards, Title 19: Chapter 15: Part 4  
State of New Mexico Statute Annotated,  
Article 5, Liquefied and Compressed  
Gases, 70-5-1 through 70-5-23, NMSA  
1978

#### List of Exhibits

1. Affidavit of Lloyd Dean.
2. LPG and CNG Act, 5 New Mexico Statutes Annotated Chapter 70, Article 5 (1978).
3. State of New Mexico, Construction Industries Division, Liquefied Petroleum Gas Standards, title 19: Chapter 15: Part 4 (Nov. 15, 1997).

March 15, 2000

From: Paul Bomgardner, Director for  
Hazardous Materials Policy  
To: Nancy Machado, Senior Attorney  
Subject: Addendum to Application for  
Preemption Determination of certain  
rules of the State of New Mexico

First, I want to thank you for taking the time to review the original application and discussing the issues of importance. I also

want to apologize for any confusion that I may have caused through some oversight in the original application. Therefore, I request that this correspondence be added to the file for the purpose of clarification of intent on the part of the American Trucking Associations (ATA).

Following is a listing of the specific sections of both the New Mexico LPG and GNG Act (N.M. Stat. Ann. §§ 70-5-1 through 70-5-23 (1998) and the corresponding regulations of the New Mexico Construction Industries Division, Liquefied Petroleum Gas bureau (Title 19, Chapter 15, Part 4 [19NMAC 15.4]) that are in question:

1. N.M. Stat. Ann. § 70-5-7 *Requiring competent employees in transporting, dispensing, installation, service or repair*; as it applies to drivers domiciled in states other than New Mexico.
2. N.M. Stat. Ann. § 70-5-7 *Annual license fees; inspection fees*; as it applies to interstate motor carriers.
3. N.M. Stat. Ann. § 70-5-10 *Revenue; suspense fund*; as it applies to the use of fees collected by the State.
4. 19 NMAC 15.4.9 *Examinations*, .1 through .5; as they apply to drivers domiciled in states other than New Mexico.
5. 19 NMAC 15.4.10 *Annual Inspections*, .1; as it applies to the inspection of equipment (eg. Cargo tanks) operated by interstate motor carriers.
6. 19 NMAC 15.4.14 *Printed Forms, Permits and Fees*, .3.C *LP Gas Visual Cargo Tank and Equipment and Inspection Form \$37.50 and Re-inspection of Cargo Tank and Equipment and additional charge for re-inspection \$37.50*; as they apply to inspection and/or re-inspection of equipment operated by interstate motor carriers.
7. 19 NMAC 15.4.15 *License Classifications, Scopes and Fees*, .1 LP-1 *Wholesale sale or delivery of LP Gas \$125.00* and .12 *Annual renewal fee per qualifying party identification card \$10.00*; as they apply to interstate motor carriers.
8. 19 NMAC 15.4.15 *License Classifications, Scopes and Fees*, .13 *Licensing examination fee \$25.00* and .14 *Licensing re-examination fee \$25.00*; as they apply to drivers domiciled in states other than New Mexico.

Thank you for this opportunity to clarify ATA's intent. If you need to contact me, please do so at: 703-838-1849 (phone) or pbomgard@trucking.org (e-mail)

[FR Doc. 00-7992 Filed 3-30-00; 8:45 am]

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